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ARTICLE 45—EVIDENCE

CPLR 4513: Sandoval held inapplicable to civil actions.

With its decision in *People v. Sandoval*,⁴⁹ the Court of Appeals recognized the broad discretion of a trial court to determine whether a prior conviction may be admitted under CPL 60.40(1)⁵⁰ for the purpose of impeaching the credibility of a criminal defendant.⁵¹ The *Sandoval* court was of the opinion that such discretion must be

accident and had never filed a change of address form with the Commissioner of Motor Vehicles. *Id.* at 731, 335 N.Y.S.2d at 31. In *Kenworthy v. Van Zandt*, 71 Misc. 2d 950, 337 N.Y.S.2d 481 (N.Y.C. Civ. Ct. N.Y. County 1972) the court held service under CPLR 308(5) to be proper where defendant told plaintiff's counsel that he would be home at a designated time to accept service and then left a letter saying he had moved to Tennessee. *Id.* at 954, 337 N.Y.S.2d at 484. See also *Buscher v. Ehrich*, 12 App. Div. 2d 887, 209 N.Y.S.2d 941 (4th Dep't 1961)(mem.); *Levine v. National Transp. Co.*, 204 Misc. 202, 125 N.Y.S.2d 679 (Sup. Ct. Queens County), *aff'd mem.*, 282 App. Div. 720, 122 N.Y.S.2d 901 (2d Dep't 1953).

⁴⁹ 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). In *Sandoval*, defendant, who had been indicted for common law murder, made a pretrial motion requesting the trial court to prohibit the use of evidence concerning past criminal convictions to impeach his credibility. The trial judge, while ruling that two of the convictions were admissible, prohibited the introduction of several other convictions, finding that their potential for unfair prejudice outweighed their probative value on the credibility issue. *Id.* at 373, 314 N.E.2d at 415, 357 N.Y.S.2d at 852. In affirming the lower court's holding, the Court of Appeals noted that although CPL 60.40 permits admission of past criminal convictions, it does not address the question of "when and to what extent a defendant may be cross-examined concerning prior convictions." *Id.* at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853 (quoting CPL § 60.40, commentary at 256 (McKinney 1971)). The Court pointed out that in the absence of legislation the trial judge has always possessed discretionary authority concerning the "nature and extent of cross-examination." 34 N.Y.2d at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853. Reasoning that the purpose of proving criminal convictions on cross-examination of a defendant is to impeach credibility, the Court of Appeals concluded that such evidence should be utilized only if its probative value on the question of credibility outweighs its prejudicial impact upon the defendant. *Id.* at 378, 314 N.E.2d at 418, 357 N.Y.S.2d at 856. In assessing the conviction's tendency to discredit the defendant, a trial court must take into account both the nature of the underlying criminal act and the lapse of time since its occurrence. *Id.* at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 855.

⁵⁰ CPL § 60.40(1) states:

If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

⁵¹ 34 N.Y.2d at 374, 314 N.E.2d at 416, 357 N.Y.S.2d at 853. Prior to the ruling in *Sandoval*, the lower courts were in disagreement concerning whether CPL 60.40(1) abrogated the judiciary's discretion to determine the admissibility of prior convictions in criminal proceedings. Compare *People v. Pritchett*, 69 Misc. 2d 67, 329 N.Y.S.2d 147 (Sup. Ct. Queens County 1972), with *People v. King*, 72 Misc. 2d 540, 339 N.Y.S.2d 358 (Sup. Ct. Queens County 1972). For a discussion of the right to impeach a witness in a criminal proceeding, including an analysis of *Sandoval*, see Note, *The Dilemma of a Defendant Witness in New York: The Impeachment Problem Half-Solved*, 50 ST. JOHN'S L. REV. 129 (1975).

vested in the trial judge to protect against the introduction of a conviction whose prejudicial impact upon the defendant overshadows its impeachment value.⁵² Recently, in *Guarisco v. E.J. Milk Farms*,⁵³ the Civil Court, Queens County, found the *Sandoval* principle inapplicable to civil actions, holding that CPLR 4513,⁵⁴ which authorizes the use of a prior conviction for impeachment purposes in civil proceedings, grants opposing counsel the absolute right to question a witness about, or offer proof of, past convictions.⁵⁵

Plaintiff Guarisco had been arrested and charged with shoplifting in the E.J. Milk Farms store.⁵⁶ The criminal action was later dismissed, whereupon plaintiff instituted a suit against defendants E.J. Milk Farms and the City of New York for false arrest, false imprisonment, assault, and malicious prosecution.⁵⁷ At a pretrial examination, plaintiff was advised by his attorney not to answer a question concerning a prior criminal conviction until a judicial determination of the propriety of the inquiry.⁵⁸ Contending that the admission of his 20-year-old conviction would be unfairly prejudicial,⁵⁹ plaintiff moved for an order restraining defendants from questioning plaintiff or offering proof at trial with respect to the conviction.⁶⁰ In ruling on plaintiff's motion, Judge Cohen noted the general

⁵² 34 N.Y.2d at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 853-54. There was a concomitant concern that a defendant's fear of being prejudiced by the introduction of prior convictions would deter him from testifying, thereby adversely affecting the validity of the fact-finding process. *Id.* at 378, 314 N.E.2d at 418, 357 N.Y.S.2d at 856.

⁵³ 90 Misc. 2d 81, 393 N.Y.S.2d 883 (N.Y.C. Civ. Ct. Queens County 1977).

⁵⁴ CPLR 4513 provides:

A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.

This statute is a reenactment of CPA 350 without substantive change. SIXTH REP. 401.

⁵⁵ 90 Misc. 2d at 82-84, 393 N.Y.S.2d at 884-85.

⁵⁶ Affirmation in Support of Motion to Restrain Introduction of Evidence, Feb. 2, 1977, at 1-2, *Guarisco v. E.J. Milk Farms*, 90 Misc. 2d 81, 393 N.Y.S.2d 883 (N.Y.C. Civ. Ct. Queens County 1977) [hereinafter cited as *Affirmation*].

⁵⁷ *Affirmation*, *supra* note 56, at 1.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1. The nature of the conviction was not disclosed to the court. 90 Misc. 2d at 85, 393 N.Y.S.2d at 886. Plaintiff argued that since he was only 20 years old at the time of his only criminal conviction, the conviction should be considered irrelevant to the current litigation. *Affirmation*, *supra* note 56, at 2.

The issue whether a defendant may be questioned about prior convictions during pretrial discovery was addressed in *Counihan v. Knoebel*, N.Y.L.J., Nov. 21, 1973, at 20, col. 7 (Sup. Ct. Suffolk County). *Counihan* was a negligence action arising out of an automobile accident. At the examination before trial defendant was asked if he had ever been convicted of driving while intoxicated. Plaintiff contended that this information was needed for purposes of im-

discretionary power of a trial court "to exclude evidence more prejudicial than probative,"⁶¹ but pointed out that such power was limited in a civil action by CPLR 4513.⁶² Although section 4513 allows a convicted person to be a competent witness, it provides that such person's conviction "may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination . . . or by the record."⁶³ The court found that this statutory language left no room for the exercise of discretion by a trial court.⁶⁴ Judge Cohen contrasted the language of CPLR 4513 with CPL 60.40(1), which authorizes an adverse party in a criminal action to introduce independent evidence of a witness' prior conviction where the witness "is properly asked whether he was previously convicted of a specified offense" and replies in the negative or equivocates.⁶⁵ Finding that the word "properly" affords a criminal court discretion to limit the scope of inquiry under CPL 60.40(1), the *Guarisco* court reasoned that the absence of similar language in CPLR 4513 precludes the exercise of judicial discretion in a civil action.⁶⁶ Judge Cohen went

peaching the defendant's credibility. The court held that defendant was not obliged to answer the question, reasoning that the examination before trial serves only to reveal facts placed in issue by the pleadings, and that evidence relating to credibility is not within this category. *Id.*

⁶¹ 90 Misc. 2d at 82, 393 N.Y.S.2d at 884.

⁶² *Id.*

⁶³ CPLR 4513 (emphasis added), quoted in note 54 *supra*.

⁶⁴ 90 Misc. 2d at 82-84, 393 N.Y.S.2d at 884-86 (citing *Del Cerro v. City of New York*, 46 App. Div. 2d 898, 361 N.Y.S.2d 707 (2d Dep't 1974) (mem.)). In *Del Cerro*, the second department, without referring to CPLR 4513, held that the trial court had erred in excluding evidence concerning the underlying facts of a witness' prior convictions. *Id.* at 899, 361 N.Y.S.2d at 709. It is unclear whether the appellate division believed that the trial judge had no discretion to exclude evidence of a prior conviction or that the trial court had abused that discretion which does exist. Similarly, in *Moore v. Leventhal*, 303 N.Y. 534, 104 N.E.2d 892 (1952), a negligence action arising from a motor vehicle accident, defense counsel asked plaintiff if he was ever convicted of a crime and plaintiff answered affirmatively. *Id.* at 538, 104 N.E.2d at 894. When defense counsel continued this line of questioning by inquiring whether plaintiff had been convicted of a specific crime, an objection was sustained on the ground that plaintiff had admitted being convicted of a crime and any further questions would not be relevant to credibility. *Id.* The Court of Appeals reversed, stating: "We do not think an admission by a witness under cross-examination that he has been convicted of a crime serves to deprive the cross-examiner of the right to show the conviction. The scope of such inquiry, as defined by section 350 of the Civil Practice Act is not so limited." *Id.* It is suggested that neither *Moore* nor *Del Cerro* restricts the discretion of a trial judge to exclude unfairly prejudicial evidence of prior convictions. The *Moore* holding seems to be premised upon the portion of CPA 350 which provided that a witness being cross-examined about a past conviction admissible under the section "must answer any question relevant to that inquiry." In *Del Cerro*, which arose after the similarly worded CPLR 4513 came into effect, the appellate division relied on *Moore* as authority for its decision. These two cases do not appear to treat the question whether a trial court, in its discretion, may refuse to admit *all* proof of a particular conviction.

⁶⁵ CPL § 60.40(1) (emphasis added), quoted in note 50 *supra*.

⁶⁶ 90 Misc. 2d at 83, 393 N.Y.S.2d at 885.

on to intimate that the policy considerations underlying the *Sandoval* decision are inapplicable to civil cases since a party stands to lose little from attacks upon his credibility.⁶⁷ Consequently, the court concluded, a defendant in a civil suit may be impeached by prior convictions without restriction.⁶⁸

The *Guarisco* court's conclusion seems contrary to the weight of existing authority. Indeed, Judge Cohen appears to have overlooked the decision of the Supreme Court, New York County, in *People v. McCleaver*.⁶⁹ The *McCleaver* court, presented with an opportunity to construe CPLR 4513,⁷⁰ determined that the statute does not abrogate the common law discretion of a trial judge with respect to the scope of cross-examination.⁷¹ Support for the *McCleaver* position may be gleaned from the decisional law of other jurisdictions which have enacted statutes similar in language to CPLR 4513.⁷²

⁶⁷ *Id.* at 83-84, 393 N.Y.S.2d at 885.

⁶⁸ *Id.* at 82, 393 N.Y.S.2d at 884.

⁶⁹ 78 Misc. 2d 48, 354 N.Y.S.2d 847 (Sup. Ct. N.Y. County 1974).

⁷⁰ Although *McCleaver* was a criminal action governed by the CPL, the court found that CPL 60.40(1) deals with the method of proving, and not the admissibility of, prior convictions. Finding no other relevant CPL provision, Justice Polsky invoked CPLR 4513 as the touchstone of admissibility. In so doing, the court was following the mandate of CPL 60.10, which states that "[u]nless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings."

⁷¹ Justice Polsky noted that an interpretation of CPLR 4513 which permits judicial discretion in determining the admissibility of prior convictions is in "conformity with the common-law authority of a court to restrict testimony to subjects relevant and material to the issues on trial and even to exclude competent evidence where its prejudicial impact far outweighs its relevance or materiality." 78 Misc. 2d at 50, 354 N.Y.S.2d at 849. It has long been established that a trial judge has control over the extent and nature of cross-examination. See *Langley v. Wadsworth*, 99 N.Y. 61, 1 N.E. 106 (1885); *McQuage v. City of New York*, 285 App. Div. 249, 136 N.Y.S.2d 111 (1st Dep't 1954). See also *People v. Sumpter*, 75 Misc. 2d 55, 347 N.Y.S.2d 670 (Sup. Ct. N.Y. County 1973). The *Sumpter* court recognized that the judiciary has discretion over the introduction of prior convictions in criminal proceedings. By way of dictum, the court stated that "[a]lthough [the] . . . authorities [permitting discretion] deal principally with [the impact of] prior convictions . . . [upon] the rights of defendants in criminal prosecutions, the same considerations should apply to other witnesses (cf. CPLR Sec. 4513)." 75 Misc. 2d at 57, 347 N.Y.S.2d at 674 (dictum).

As noted by one commentator, the presence of the word "may" in CPLR 4513 tends to support the contention that judicial discretion is permitted in determining the admissibility of a witness' past criminal convictions. 5 WK&M ¶ 4513.10, at 3-315 to -316. But see *McLaughlin, Evidence*, N.Y.L.J., Nov. 9, 1973, at 1, col. 1, at 4, col. 3, wherein Dean *McLaughlin* stated that "CPLR 4513 appears to leave no room for discretion," *id.* at 4, col. 3, and suggested that CPLR 4513 be amended so as to make the rules in civil and criminal proceedings uniform. *Id.*

⁷² See *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965). *Luck* involved § 305 of title 14 of the District of Columbia Code, which at the time provided in pertinent part:

It is submitted that the *Guarisco* decision is questionable for another and perhaps more significant reason. In reaching his conclusion, Judge Cohen appears to have brushed aside the policy considerations upon which *Sandoval* was premised.⁷³ The *Sandoval* court indicated that proof of prior crimes could result in a conviction unfairly based on the impression that a witness-defendant possesses

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of [a] crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining shall not be concluded by his answers as to such matters.

Pub. L. No. 88-241, § 1, 77 Stat. 519 (1963) (amended by D.C. CODE § 14-305 (1973)). With respect to the question of whether this statute permits the exercise of judicial discretion, the court in *Luck* stated:

Section 305 is not written in mandatory terms. It says, in effect, that the conviction "may," as opposed to "shall," be admitted; and we think the choice of words in this instance is significant. The trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case.

348 F.2d at 767-68 (footnote omitted).

The Supreme Court of California, in interpreting § 788 of the California Evidence Code, reached a result similar to that of the *Luck* court. Section 788 of the California Evidence Code provides in pertinent part:

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . .

CAL. EVID. CODE § 788 (West 1966). The court found that the statute permitted discretion concerning the admissibility of a witness' prior convictions. This conclusion was based on the same rationale employed in *Luck*, i.e., the legislature's use of "may" rather than "shall." *People v. Beagle*, 6 Cal. 3d 441, 452, 492 P.2d 1, 7, 99 Cal. Rptr. 313, 319 (1972).

There seems to be a discernible trend toward the codification of judicial discretion in this area. See FED. R. EVID. 609(a). Broad discretion is afforded the judiciary by Uniform Rule of Evidence 609, which provides:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years had elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

UNIFORM LAWS ANNOTATED (1975). Although the Uniform Rules were promulgated as recently as 1974, at least three states already have adopted them. See HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 285 (1976).

It is interesting to note that a 1973 Conference of New York Civil Court Judges voted almost unanimously in favor of permitting judicial discretion over the admissibility of prior convictions. See McLaughlin, *Evidence*, N.Y.L.J., Nov. 9, 1973, at 1, col.1, at 4, col. 3.

⁷³ See 90 Misc. 2d at 82, 393 N.Y.S.2d at 884.

a propensity toward committing the alleged act.⁷⁴ While the interests at stake in a civil action often are less momentous than the possible loss of liberty facing a criminal defendant, it would seem that the rights of a party in a civil suit also may be unfairly prejudiced by the suggestion that he has a propensity toward certain criminal activity. The facts of *Guarisco* are particularly illustrative of such a possibility. After the introduction of Guarisco's 20-year-old conviction, a jury might conclude that a propensity existed toward criminal activity, particularly theft. From this conclusion it might be inferred that defendant had probable cause to believe that Guarisco was shoplifting, thereby undermining one of plaintiff's causes of action.⁷⁵ Such a result would appear harsh, especially in view of the number of years which had passed since plaintiff's criminal conviction.

New York courts traditionally have adhered to the common law doctrine allowing a trial judge broad discretion in establishing the permissible scope of cross-examination.⁷⁶ As recognized in *Sandoval*, the exercise of such discretion can aid in preventing unfair prejudice to a party witness.⁷⁷ The *Guarisco* holding appears to be an abrupt departure from this wise policy, and as such, opens the door to possible unfair prejudice in civil actions. It is hoped that future decisions will reject the *Guarisco* rationale and read CPLR 4513 as permitting the exercise of sound judicial discretion.

CPLR 4519: Dead Man's Statute held not to bar testimony of potential distributee concerning pedigree declarations made by intestate.

Designed to protect decedents' estates from fabricated claims and perjured testimony, CPLR 4519, New York's "Dead Man's Statute," renders an interested witness⁷⁸ incompetent to testify in

⁷⁴ 34 N.Y.2d at 376, 314 N.E.2d at 417, 357 N.Y.S.2d at 854; *accord*, *People v. Schwartzman*, 24 N.Y.2d 241, 247, 247 N.E.2d 642, 646, 299 N.Y.S.2d 817, 823, *cert. denied*, 396 U.S. 846 (1969).

⁷⁵ In order to establish a cause of action in malicious prosecution, plaintiff must demonstrate that defendant acted without probable cause in initiating the prosecution. *See* W. PROSSER, *LAW OF TORTS* § 119, at 841 (4th ed. 1971).

⁷⁶ *See* *Langley v. Wadsworth*, 99 N.Y. 61, 1 N.E. 106 (1885); *McQuage v. City of New York*, 285 App. Div. 249, 136 N.Y.S.2d 111 (1st Dep't 1954).

⁷⁷ 34 N.Y.2d at 375, 314 N.E.2d at 416, 357 N.Y.S.2d at 853-54.

⁷⁸ CPLR 4519 provides in pertinent part:

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from, through or under a deceased person . . . by assignment or otherwise, concerning a